BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ENRIQUE ROSAS Claimant	)	
VS.	)	
CHEYENNE DRILLING, LP Respondent	)	Docket No. **1,036,638**
AND	)	
AMERICAN HOME ASSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requests review of the January 24, 2008 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The claimant was injured in an automobile accident after he had left work for the day. Claimant was traveling from the work site to the location of his camper trailer where he had temporarily relocated for this assigned job.

The Administrative Law Judge (ALJ) awarded the claimant benefits after he determined that travel was an integral part of claimant's employment and consequently, the "going and coming" rule set forth in K.S.A. 44-508(f) did not apply.

The respondent requests review of whether claimant sustained an accidental injury arising out of and in the course of employment, specifically whether the "going and coming" rule applies in this case. Respondent argues the facts in this case are similar to *Butera*[1] and therefore the ALJ's Order should be reversed.

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[1] *Butera v. Fluor Daniel Const. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

Claimant argues that travel was an inherent part of his employment and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Respondent is an oil drilling company located in Garden City, Kansas. Respondent hired claimant to work as an oilfield worker and assigned him to work at various sites in Texas, New Mexico, Kansas, Oklahoma and Colorado. He had no permanent work location and his assignments would last various periods of time.

Enrique Rosas was employed by respondent as a driller. His job duties included running a crew and drilling gas wells. On July 28, 2007, claimant was working at a site in New Mexico. After claimant had left work for the day he was a passenger in a car driven by a co-worker that was going from the work site to Dalhart, Texas, where claimant's camper trailer was located. Both men were staying in the trailer while assigned to the job in New Mexico. It was anticipated that the job would take approximately three months.

As the men were heading to their temporary dwelling their vehicle collided with another automobile. The claimant suffered multiple injuries including a right femoral shaft fracture, a right supracondylar femur, first through ninth rib fractures on the left, first, second, third, fifth and sixth rib fractures on the right, flail chest, left pneumothorax, sternal fracture, and right C7 transverse process fractures.

Respondent argues the "going and coming" rule is applicable and consequently, this claim is not compensable. This Board Member agrees.

The "going and coming" rule contained in K.S.A. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 44-508(f) is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[2] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[3]

But K.S.A. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[4] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[5]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[6]

The ALJ concluded that in this case the claimant met his burden of proof to establish that travel was an integral part of his employment with respondent. The ALJ's Order provided in pertinent part:

> The Claimant's work as a driller required him to work at temporary work sites and he did not have a permanent work place. The Respondent did not hire local crews to work on its rigs but instead hired permanent crews to work traveling from state to state and job site to job site. The employees were paid a per diem of $40.00 per day, and they provided their own transportation. The Claimant and other crew members were staying in Dalhart, Texas while working on this rig.

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[2] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[3] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[4] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[5] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

> The Court finds that traveling to and from the drilling rig in New Mexico is an integral part of the Claimant's employment and is inherent in the nature of the employment as a driller. *Messenger v. Sage Drilling*, 9 Kan. App.2d 435, Syl. (2).[7]

Respondent appealed the ALJ's Order and contends that recent case law, particularly *Butera*[8], compel the Board to reverse the ALJ's decision. Respondent suggests that under the *Butera* rationale, claimant's voluntary relocation to a trailer closer to the work site meant that his daily commute was no more than any other employee would encounter. And as such, his vehicular accident on the way to the trailer at the end of his work day was not a compensable event. In support of this argument respondent offers the fact that claimant is not provided transportation to the work site, he is not provided with any sort of mileage and the daily per diem he is paid is contractually intended to be used for items other than gas or commuting expenses.

This Board Member concludes this decision should be reversed under the Court of Appeals' analysis set forth in *Butera*. In *Butera*, the injured employee was assigned to work at a nuclear plant hundreds of miles from his home. He relocated to a hotel within 30- minute drive of the nuclear plant, traveling each day to the plant to work and returning each evening to his temporary dwelling. The *Butera* Court concluded that claimant's commute from the hotel to the job site did not expose him to any further risk than any other employee and that while he had to drive to the job site, travel was not inherent in his job.[9] Although the travel from his home to the temporary dwelling location would fall within the course and scope of his employment, travel from the job site to the temporary dwelling did not.

Given this analysis, this member of the Board finds that claimant's accident is not compensable. Like the claimant in *Butera,* claimant had temporarily relocated to his trailer in Texas and was traveling between the work site and this trailer. His vehicular accident occurred as claimant was driving to his temporary dwelling after his shift was completed. He was not on the clock nor was he being paid his mileage. On these trips he was essentially traveling to and from his workplace. Under the Court of Appeals interpretation of K.S.A. 44-508(f) claimant's accident was not compensable. The ALJ's preliminary hearing Order is therefore reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this

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[7] ALJ Order (Jan. 24, 2008) at 1.

[8] *Butera*, 28 Kan. App. 2d 542, 18 P.3d 278 (2001).

[9] *Id*.

[10] K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated January 24, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March 2008.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Stephen L. Brave, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[11] K.S.A. 2007 Supp. 44-555c(k).